United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

AERONAVES DE MEXICO, S.A.,

Plaintiff-Appellant,

—against—

TRIANGLE AVIATION SERVICES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (BRIEANT, J.)

BRIEF FOR DEFENDANT-APPELLEE

Statement

A. *Preliminary*

Plaintiff-appellant ("Aeromexico") entered into a contract, expiring December 31, 1975, with defendant-appellee ("Triangle"), pursuant to which the latter was obligated to furnish ground services, together with the necessary manpower and equipment, to and for Aeromexico's commercial aircraft flights into and out of JFK International Airport. Aeromexico alleges it changed from DC-8 aircraft to DC-10 aircraft. The contract (A6-A26; repeated at A41-A61)* allows for any number of contingencies, including, expressly, changes in aircraft types, which may result in escalated or increased charges. Negotiations are then to ensue if the increase is not consented to. Triangle

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* "A", followed by a number, refers to that page of the Appendix submitted herein.

says the contract is clear that, if the parties can't agree on the increase, the controversy goes to arbitration for disposition. Aeromexico has it the contract mandates that it must be "satisfied" with the increase and, if it is not satisfied, that ends the matter, with Triangle to bear the increased cost. In this instance, Aeromexico alleges it has halted the DC-8 flights in effect at the time of entry into the contract and, since it was not satisfied with the "quotation" set out by Triangle for servicing Aeromexico's DC-10 aircraft, the contract is at an end, as of the end of May, 1974 (A3-A5). Aeromexico, after turning down Triangle's price, hired another firm to perform ground services (often referred to as ramp services) for the DC-10 aircraft (see complaint, par. 11, A4; see, also, the demand for arbitration annexed to the complaint, at A32). Triangle demanded arbitration of the controversy. Aeromexico brought this action for a declaratory judgment of non-arbitrability and moved for a stay, on the aforedescribed theory. The lower court disagreed with Aeromexico's view, pointing out, *inter alia,* that it just would not "infer" that one party was granted the "unilateral power to abrogate or terminate this contract for a fixed term simply by refusing or failing to agree. Rather, using language apt for a perceived need, they granted the arbitrator power sufficiently broad to fix such prices." (A96). Aeromexico's complaint for a declaratory judgment was dismissed, its motion for a stay of arbitration was denied, and the lower court directed arbitration pursuant to Sec. 4 of the Federal Arbitration Act (A100). Aeromexico then appealed.

The notice of appeal is not set out in the Appendix, prepared by Aeromexico, albeit not in full accord with Rule 30(b) of the Federal Rules of Appellate Procedure. Triangle raises no issue with respect thereto but, in the light of the contents of the cited Rule, points out that the notice of appeal herein states on its face that the appeal is from that part of the final judgment (A99-A100), entered September 30, 1974, which

1. Granted Triangle's motion to dismiss the complaint for a declaratory judgment for failure to state a claim;

2. Denied Aeromexico's motion for a stay of arbitration;

3. Directed the parties to proceed to arbitration pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C., Section 4.

The lower court did grant, *sua sponte,* a stay of arbitration pending the decision on this appeal (A100). Apart from what took place prior to the institution of arbitration proceedings early in June of 1974 (A67), the latter have already been delayed about eight months, as of the writing of this brief, by virtue of the instant litigation, and they will, of course, be further delayed unless and until this Court puts an end to what, we expect to demonstrate, amounts to a classic example of the frustration of the principal benefits of commercial arbitration—speed and finality—through the device of litigious maneuvers; this in the face of a most blatantly outrageous breach of contract on Aeromexico's part.

As regards Aeromexico's first ground for appeal (the alleged error in dismissing the complaint), annexed to, and made a part of, the complaint is the contract which is the subject of this action (A6-A26; repeated at A41-A61). Triangle's position is that the contract, on its face, without room for doubt, clearly envisages ground services to all of Aeromexico's commercial flights into and out of John F. Kennedy International Airport, whether the planes are DC-8s or any other type, that a change from DC-8s to another type calls for negotiations with respect to price if an increase in charges is determined by Triangle and is disputed and, if negotiations are not successful, an arbitrator determines the price. If this view is upheld, it follows, obviously and without the need for citation, the complaint fails, without room for amendment. Of course,

the facts set out in the complaint—again the proposition is too elementary to require citation—are accepted as true for the purpose of the motion. Correspondingly, however, such statements as "the contract does not provide for arbitration of charges for servicing DC-10-30 aircraft," "Aeromexico made no agreement with Triangle to service any aircraft other than DC-8," the contract "does not empower an arbitrator to establish or create a new contract" (all at A4), are not admitted. These statements are not facts, but legal conclusions, patently erroneous at that.

As regards the second ground for appeal, the alleged error in denying Aeromexico's application for a stay of arbitration (A35-A69), since that application is also predicated on the same contract just referred to (See A41-A61), it follows that, if the complaint is dismissed, the stay must perforce be denied. Indeed, this was the main point we argued below to counter the motion for a stay. The Court does not appear to have considered any other ground (A90-A98) for denying the stay.

As regards the third ground, the direction to arbitrate pursuant to Sec. 4 of the Federal Arbitration Act, while it might have been expected that some separate point were involved and would be discussed by Aeromexico, that does not appear to be the case. The statute receives only the most peripheral mention, at p. 17 of Aeromexico's brief in this Court, and it appears to have been abandoned as a separate ground of appeal.

B. *Facts*

Notwithstanding the referred to motion for a stay of arbitration and the submission of affidavits in support and opposition, the decision below, to repeat, was predicated on the ground that the complaint failed to state a cause of action in the light of the contract annexed thereto, and on no other ground. Accordingly, notwithstanding the contents of the Appendix reveal the incomplete—and inac-

curate—statement of facts in the complaint, we perforce restrict ourselves to those properly alleged therein, which constitute the only ones before this Court. Unhappily, Aeromexico, in its brief (p. 14-17), goes beyond those facts, without authority (and erroneously, in any event). We may not, and therefore will not, counter by setting forth our version, contained in the Appendix, which delineates the grossness of Aeromexico's actions. We respectfully suggest to this Court that any factual presentation dehors the complaint, cannot be received, whether proffered by us or by the other side.

There is an ancillary reason for our not getting into any of the facts developed in support and in opposition to the motion for the stay, below. We consider the denial of that motion not to be appealable, certainly not under Title 28, U.S.C., Sec. 1291, and not under Title 28, U.S.C., Sec. 1292(a)(1).

Accordingly, we turn to the contract itself, at the core of the decision below, and which, we submit, delineates the correctness of that decision. It does more. It establishes, we firmly submit, that it is beyond reason to question, from the express wording employed, the arbitrability of any controversy over contractual coverage of Aeromexico's change to DC-10 aircraft from DC-8 aircraft, and the charges to be made for providing ground services thereto.

The contract was made November 16, 1973 (A6; A41). It is scheduled to expire December 31, 1975, with automatic annual renewals, unless, by October 1 of each year, including 1975, either party gives notice of termination. Under certain circumstances not presently germane (bankruptcy, expiration of permits, war, etc.), the contract comes to an end upon 60 days prior written notice (A16-A17; A51-A52). The contract sets out what each of the parties is to do, what the charges therefor are, and, in particular, sets out in Article 3-3 (A9; A44), the following, highly relevant provisions:

"3-3 The basic charges set forth in Exhibit D are predicated upon requirements for manpower and equipment as determined from the flight activity schedules annexed hereto as Exhibits B and C. Should the actual schedule for the periods in question differ either in volume of flights, aircraft types or arrival/departure times of flights from those set forth in Exhibits B or C or should average cargo load factors over any two week period exceed historic norms, then any additional manpower and equipment required for the performance of services hereunder will be determined by TRIANGLE, and an increase in the charges will be negotiated to the satisfaction of both parties upon ten (10) days notice to AIRLINE. The increased charge arrived at as a result of such negotiations shall apply retroactively to a date commencing ten (10) days after the receipt by the AIRLINE of the aforesaid ten (10) days notice. Failure by AIRLINE to proceed to negotiate such increase within twenty (20) days of the date of the notice shall be deemed to constitute agreement by AIRLINE to the increased charges as determined by TRIANGLE."

The Exhibits B and C referred to in the quoted clause (to be found at A23-A24 and A58-A59) contain the flight schedules, including, we note, the type of plane in use at the time of contract. It will further be noted that, after reciting that the basis of the charges set out is predicated on the manpower and equipment necessary to cope with those schedules, the clause then expressly details the procedure to be followed if there is a change therein, more particularly, a change in any or all of these circumstances:

a) volume of flights

b) aircraft types (which the instant controversy is about)

c) arrival/departure times

d) average cargo load factors.

In such event, Triangle determines what additional manpower and equipment is needed and, if Triangle then demands an increase, that increase is to be negotiated "to the satisfaction of both parties" (the phrase seized upon by Aeromexico) after 10 days notice. If Aeromexico does not proceed to negotiate within 20 days after the notice, the increase determined by Triangle becomes effective.

Article 3-3 is not all. Article 3-6 (in pertinent part) reads, as follows (A11-A12; A46-A47):

> "3-6 The charges set forth in this Agreement are established in the light of current employer contributions or payments for Social Security, Unemployment Insurance, New York State Disability Insurance, and the current pertinent Collective Bargaining Agreements of TRIANGLE. In addition, the charges are established in the light of other costs of TRIANGLE, in turn, related to labor costs, such as Port Authority Fees, certain insurance, etc. Accordingly, in the event the employer's contributions for Social Security, Unemployment Insurance, and/or New York State Disability Insurance are increased, and/or if any other charge of whatever kind or another is required by law to be paid by TRIANGLE to or on behalf of its employees, and/or if TRIANGLE incurs higher labor costs through higher wage rates and other employee benefits, then upon ten (10) days notice to AIRLINE, the parties hereto shall negotiate revision in the Basic Charge so as to include said increased cost resultant therefrom. Failure by AIRLINE to proceed to negotiate such increase within twenty (20) days of the date of the notice shall be deemed to constitute agreement by AIRLINE to the revised charges as determined by TRIANGLE. * * *"

Thus, substantially the same pattern as in Article 3-3 is followed. It is first recited that the charges set out are based on certain current Triangle costs; the clause then expressly notes the procedure to be followed if there is an

increase in those costs, such as, for example, Social Security, unemployment insurance, disability insurance, negotiated wage rates and other employee benefits, and other increases (e.g., increases in the minimum wage required by law and, by necessary implication, we submit, increases in Port Authority fees). The revised charges, here, too, are then determined by Triangle, the parties proceed to negotiate with respect to the said increase after 10 days notice by Triangle to Aeromexico, and, unless Aeromexico proceeds to negotiate within 20 days after the notice, the increased charges determined by Triangle become final.

Article II sets out some of the basics of the information to be supplied Triangle with regard to its plane movements (cf. Exhibit B annexed to the contract). In particular, by Article 2-2 (A7; A42), Aeromexico is obligated to furnish, two weeks in advance, a flight movement advisory for the ensuing month, and to notify Triangle of any changes whatsoever in that plan.

Finally, we direct attention to Exhibit D annexed to the contract (A25; A60), wherein it is also made clear the charges are based on the combined schedules of Iberia, Aeromexico, and Lan-Chile. (The arbitrator would be most interested in why this is so but, again, we consider ourselves barred from elaborating thereon.) Thus, if either Aeromexico, or Iberia, or Lan-Chile, change its schedule, or should any other change take place, inclusive of, but not limited to—once again—

a) volume of flights

b) aircraft types

c) arrival/departure times,

then, by the express terms of this Exhibit D, Triangle determines the manpower and equipment necessitated by the recited changes, determines the increase in charges, if any, and the increase is then "negotiated" in accordance with Article 3. There is no specific reference here to Article 3-3.

Exhibit D refers to Article 3 as a whole. Neither Article 3-6, nor Exhibit D annexed to the contract, refers to negotiation "to the satisfaction of both parties."

Finally, we note, in connection with the negotiations referred to, there is no direction, in so many words, as to the next step, if the negotiations over increases based on all these various changes do not result in an acceptable compromise. What is present, however, is Article VII—the arbitration clause (A17; A52) which reads, as follows:

"ARTICLE VII

Arbitration

> Any and all controversies in connection with and/or arising out of this Agreement or the breach thereof shall be exclusively settled by arbitration in New York City according to the rules of the American Arbitration Association. Judgment upon the award may be entered in the Supreme Court of the State of New York or in any other court having jurisdiction thereof."

Thus, to be "exclusively settled by arbitration" are not some controversies, but "any and all controversies," whether arising out of the contract or its breach, or whether they are only connected with the agreement or its breach. It is this clause which the Court below characterized, in its opinion, as "about as broad in scope as our language permits" (A93).

The contract, by its terms, is to be "governed by and construed in accordance with the law of the State of New York" (Article 8-5, A18; A53).

ARGUMENT

POINT I

The complaint, on its face, and as a matter of law, demonstrates the unresolved controversy between the parties is subject to and encompassed by the arbitration clause in the contract. Accordingly, the complaint fails, and the action was properly dismissed.

Plaintiff's position, as reflected in its complaint (par. 17; A5) is that a controversy does exist but, so we presume plaintiff intends to say, the controversy is over whether the contract covers ground services and charges for DC-10 aircraft as opposed to DC-8s. Plaintiff has it (par. 14, A4) that it made no contract with defendant to service any aircraft other than DC-8s. It apparently concedes that the contract does provide for the negotiation of DC-10 charges "to the satisfaction of both parties," but concludes it does not provide for arbitration in the event the negotiations are unsuccessful (par. 13, A4). It follows, then, so Aeromexico's reasoning goes, that, since it was not satisfied with the charges, for the DC-10 services, and since (at least that is what it alleges) it is not operating DC-8's into JFK, the contract with Triangle is effectively at an end. And, this is true notwithstanding the contract [save for contingencies not presently involved, such as war, bankruptcy, etc. A16; A51—even in such situations, termination is contingent on 60 days' prior written notice to terminate on December 31, 1975 unless renewed automatically (or otherwise)] (Article 6-1, A16; A51).

First, Aeromexico reads the contract incorrectly. We have already pointed out that, if Aeromexico changes the type of aircraft it uses (once again, Article 3-3 and Exhibit D to the contract; A9-A10 and A25; A44-A45 and A60) only an "increase in the charges" is to be negotiated. If

there is no increase, the contract does not even require negotiation—Aeromexico simply pays. One of the initial questions, then, is there an increase. And, who determines this question? Is it not obvious that the arbitrator determines this, if the parties can't agree as to whether there is an increase in the first place. In this connection, Aeromexico alleges "Triangle submitted a quotation (Exhibit B hereto)" (par. 8, A3). The referred to exhibit (A27-A28) does not reveal a quotation; it does not reveal a "bid." Rather, it reveals that Triangle is telling Aeromexico what the charge is, and submitting a supplement reflecting, inter alia, the addition of the DC-10 charge to the charge sheet originally set out, in addition to providing for some special auxiliary equipment necessitated by the placing of the DC-10 into operation. The exchange of correspondence set out reveals Aeromexico's unwillingness to accept the charge (as well as failure to meet the requirement of sixty days written notice of termination).

Secondly, and more importantly, the contract, again as previously noted, sets out a whole series of eventualities which could bring about price increases, eventualities not limited to changes in aircraft types. These eventualities also included changes in schedules, arrival/departure times, volume of flights, load factors (in Article 3-3 and Exhibit D annexed to the contract), wage rates and fringe benefits, unemployment insurance costs, etc. (in Article 3-6). As regards all of them, if Triangle determines an increase in charges is necessary, there need be, according to Aeromexico, only negotiations. Failure of these negotiations leaves Triangle with no remedy. Its escalation protection vanishes, its manpower and equipment utilization may go up, it can even go bankrupt, but it can neither arbitrate nor go to Court. To put it another way, if Aeromexico is not satisfied that ends the matter. That is the key—Aeromexico's "satisfaction." But, even under that (to us, incredible) interpretation, ending the matter merely implies no obligation to pay an increase. It does not imply that the

contract is terminated, which brings us right back to the proposition that, even under Aeromexico's view that it posseses an absolute veto over increases, was there an increase in the first place and, which forum determines that question. But, Aeromexico is saying it does not have to arbitrate that either.

We note the rather curious prayer for relief (A5). Item 1 calls for a judgment declaring no contract exists between the parties "with reference to" the provision of ground services to Aeromexico's DC-10 aircraft. Item 2 calls for a judgment that Aeromexico is not obligated to deal with Triangle "with reference to" servicing its DC-10 aircraft. But, it is not possible to ignore the express and repeated contractual reference to changes in aircraft types. And, even Aeromexico concedes it was contractually bound to negotiate with respect to a change from DC-8 to DC-10. Indeed, the complaint in effect alleges it did negotiate, but that it was not satisfied. It seems to us to follow, then, if the cited portion of the prayer for relief is to make any sense at all, in the light of the contract and the complaint's allegations, that the prayer is really predicated on one of two propositions, to wit:

1) Triangle so breached its duty to negotiate—that is, so breached its contract, that the previous obligation to negotiate (or deal) with Triangle with reference to DC-10 aircraft has expired, so that all applicable contract provisions with respect to DC-10s have come to an end and no longer exist; or

2) Negotiation over the DC-10 failed because of Aeromexico's dissatisfaction with Triangle's "quotation," which dissatisfaction ends all contractual obligations on Aeromexico's part vis a vis its DC-10 aircraft.

As regards the first alternative, since the arbitration clause expressly includes within its scope controversies over breaches, the question as to whether defendant failed to

negotiate is automatically arbitrable. Such a controversy may not be settled by the Court (*Matter of Potoker*, 2 N.Y.2d 553, 559-560).

As for the second alternative such a construction would mean that, despite all the myriad escalation provisions, all the provisions dealing with changes in schedules, flight volume, load factors, as well as changes in aircraft types, etc., and no matter how onerous and expensive to Triangle, the burden of all these are on defendant.

Aeromexico, below, while carefully avoiding a precise and clear statement as to what it would do if it were dissatisfied with an increased charge as a result of an increase, let us say, in wage rates (Article 3-6, A11-A12; A46-A47), attempted to draw a distinction between the sort of changes listed in Article 3-6 and those listed in Article 3-3 (A9-A10; A44-A45). The essential distinction, it argued, lies in the fact that, in Article 3-6, there is to be a negotiation, albeit without the governing phraseology, "to the satisfaction of both parties." But, in Article 3-3 that phrase does appear and, we may presume, in that distinction lies the magic.

For our part, we concede we have never heard of negotiations that did not contemplate satisfaction on both sides, or, more accurately, that any arrangement arrived at would have to be acceptable to both sides, this, whether the words, "to the satisfaction of both parties," are used or not. In our judgment, it is too obvious for words that the phraseology employed, with or without the "magic" words, was designed to require submission of increased charges, reasonable questions and objections, if any, leading to mutual assent, failing which, a neutral party would resolve the controversy. It is this simple proposition which is being so vigorously contested, under the guise of a contrived distinction devoid of any real significance, and concocted, we fear, to justify what we have referred to, and now do again, as an outrageously blatant breach of contract on Aeromexico's part.

Let us explore, just a bit further, the "magic" words. Let us forget, for the moment, about changes in aircraft types. Article 3-3, where the change in aircraft types charge is referred to (apart from Exhibit D annexed to the contract), also lists, as we have noted, three other changes to be accorded precisely the same treatment as a change in aircraft type, to wit, changes in arrival/departure times, volume of flights, and load factors. In these situations, too, negotiations over increases must be to the "satisfaction of both parties."

We now assume that the load factor is increased—on DC-8s, moreover, not DC-10s—simply because Aeromexico decides, with proper authority, to accept more free baggage, or because of some other factor. Handling that increased cargo requires more men and more equipment and so, Triangle asks for an increase in charges. Let us assume further, Aeromexico is not satisfied with the negotiations. In fact, it wants to pay no increase at all. It is Aeromexico's position that the matter is closed. Its duty, under Article 3-3, so it says, is simply to negotiate, with the ultimate decision as to agreement being left to it alone and either Triangle endures the additional cost or, bluntly, if it doesn't like it, it can "lump it."

We take one more example under Article 3-3. A rate is fixed on the basis of a DC-8 arriving, let us assume, at 1:30 p.m. and another at 9:30 p.m. Triangle can so dispose its work force and equipment so as to service the 1:30 arrival, finish the job, do another job, and then take on the 9:30 arrival. Thereafter, Aeromexico decides, for reasons of its own, that it wants one plane to arrive at 10:00 a.m., and the other at 11:00 p.m. This would obviously require a substantial redistribution of the work force and equipment involved, with different pay rates, premium pay, etc. Triangle then asks for an increase. Here, too, it is Aeromexico's position that all it has to do is negotiate. If it is not satisfied, the burden of the change remains on Tri-

angle. Aeromexico alone decides the increase or any part thereof, without recourse by Triangle. Aeromexico's obligation, once again, has been fulfilled simply by participation in the negotiation process.

It is difficult to avoid the use of extreme language in commenting on this construction, which flies not only in the face of the wording of the contract, but also, in the face of reason itself. It leaves Triangle at the complete mercy of Aeromexico, for it means Triangle must absorb all the increased costs against which it went to such pains to protect itself in the express wording of the contract; it means that Aeromexico can terminate the contract—precisely as it has done here—merely by instituting a change, getting Triangle's recalculated charge, then saying it was dissatisfied with the new charge.

It is, of course, absolutely settled (actually it is Hornbook law, hardly requiring elaboration) not only under New York law, but also under Federal law as well, that a contractual construction which places one party to a contract at the mercy of the other is against the general policy of the law (*Fair Pavilions, Inc.* v. *First Nat. City Bank,* 19 N.Y.2d 512; *Kates* v. *Yeshiva University,* 32 Misc.2d 145, modified 18 A.D.2d 692, mot. den. 12 N.Y.2d 1017, aff'd 13 N.Y.2d 805, reh. den. 13 N.Y.2d 893; *Fleischman* v. *Fergueson,* 223 N.Y. 235, 241; *Simon* v. *Etgen,* 213 N.Y. 589, 595). Parties to an agreement are presumed to act sensibly in regard thereto and an interpretation producing absurd or harsh results is to be avoided (*River View Associates* v. *Sheraton Corp.,* 33 A.D.2d 187, aff'd 27 N.Y.2d 718). A reasonable interpretation as against an unreasonable one must be given if at all possible (*Suburban Club of Larkfield* v. *Town of Huntington,* 56 Misc.2d 715, modified on other grounds, 30 A.D.2d 541; *Cross Armored Carrier Corp.* v. *Valentine,* 49 Misc.2d 917, 921, aff'd 28 A.D.2d 1090).

Some of the numerous Federal cases to the same effect are *Elte, Inc.* v. *S. S. Mullen, Inc.*, 469 F.2d 1127, 1131; *National Surety Corp.* v. *Western Fire & Indemnity Co.*, 318 F.2d 379, 386; *Kenyon* v. *Automatic Instrument Co.*, 160 F.2d 878, 883; *Roper* v. *Capital View Realty Co.*, 107 F.2d 833.

See, also, 3 Corbin, Contracts, Sec. 552, at 210-11 (1960); Restatement, Contracts, Sec. 236 (a) (1932).

We make the foregoing citations for the sole purpose of delineating the judicial disposition of interpretations such as the one sought here. We are not to be deemed to be suggesting in any way that there is an ambiguity to be resolved. Indeed, and oddly enough (albeit for other reasons) Aeromexico agreed with this latter proposition below, where, at p. 6 of its memorandum in reply to Triangle's memorandum in opposition to the motion for a stay, this is found:

> "This doctrine (referring to what it termed resolutions of ambiguities against the drafter) need not be applied here, however, since the contract is unambiguous as regards the intent of the parties" (matter in parentheses supplied).

Curiously, this flat statement is not repeated in Aeromexico's brief here. We do have, however, a suggestion as to a remand for a hearing (p. 18 of the plaintiff-appellant's brief), which, regrettably obviously, would merely compound the already inordinate delay in resolving the present controversy. In any case, Aeromexico is not setting out the law correctly. The law in this Circuit—indeed, it is just about settled law in all jurisdictions, so far as we have been able to discern—is that the rule calling for a strict interpretation against the drafter (and there are no facts here with respect to who is responsible therefor) applies only in cases of "fair doubt", or where the contract is susceptible to more than one reasonable interpretation (*Na-*

tional Equipment Rental v. *Reagin,* 2nd Cir., 338 F.2d 759, 762-763, citing, in turn, the applicable New York rule of interpretation as set out in *Rentways, Inc.* v. *O'Neill,* 308 N.Y. 342, 347, and 3 Corbin, Contracts, Sec. 559, at p. 268; *Inman* v. *Milwhite Co., Inc.,* 8th Cir., 402 F.2d 122, 123-124; *Tenneco, Inc.* v. *Greater Lafourche Port Commission,* 427 F.2d 1061, 1065, citing Restatement of Contracts, Sec. 236 (d), cert. den. 91 S. Ct. 142, 400 U.S. 904, 27 L. Ed. 2d 141; *Boeing Company* v. *U. S.,* U.S. Ct. of Claims, 480 F.2d 854, 864. New York law, under which the parties agreed the contract would be "governed and construed" (A18; A53), is precisely the same (*Rentways, Inc.* v. *O'Neill, supra; General Venture Capital Corp.* v. *Wilder,* 26 A.D.2d 173, 176-177; *Dorothy Stein Shops, Inc.* v. *Roscon Realty, Inc.,* 59 Misc.2d 122). The rule of construction set out by Aeromexico does not apply where the challenger proffers an interpretation that is—we regret the word—ridiculous. Where the contract is clear, in and of itself, and the intention to the parties may be gathered "from the four corners of the instrument," interpretation of the contract is a matter of law and no trial is necessary to determine its legal effect (*Bethlehem Steel Co.* v. *Turner Construction Co.,* 2 N.Y.2d 456, 460, citing *General Phoenix Corp.* v. *Cabot,* 300 N.Y. 87).

The arbitration sought (A32-A33) by Triangle is strictly attuned to the controversy raised by Aeromexico's conduct in refusing to pay the DC-10 charges, illegally terminating the contract, and hiring another to do its ramp work. Judge Brieant held that, vis a vis our motion to dismiss Aeromexico's declaratory judgment complaint (in effect, seeking to nullify this attempt to seek arbitration), his function was limited to ascertaining whether we, in seeking arbitration, are making a claim on its face governed by the contract to arbitrate, citing this Circuit's holding in *Hamilton Life Insurance Company* v. *Republic Nat. Life Ins. Co.,* 408 F.2d 606, 609. He found this was clearly the case.

The *Hamilton* case not only sets out the rule in this Circuit, but also, we submit, articulates the general rule followed by the Federal Courts. Additionally, it accurately reflects the New York law.

In *Matter of Exercycle Corp. (Maratta)*, 9 N.Y.2d 329, at p. 334, the New York Court of Appeals said:

> "Once it be ascertained that the parties broadly agreed to arbitrate a dispute 'arising out of or in connection with' the agreement, it is for the arbitrators to decide what the agreement means and to enforce it according to the rules of law they deem appropriate in the circumstances."

In a later case, *Matter of Weinrott (Carp)*, 32 N.Y.2d 190, 195-196, the New York Court of Appeals quoted this language with approval. Indeed, *Weinrott* stands for the proposition, we submit, that a broad arbitration clause implies the parties' selection of "their tribunal," so that "Judicial intervention," here, as there, "defeats * * * two of arbitration's primary virtues, speed and finality (see Amicizia Societa Nav. v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808, cert. den. 363 U.S. 843)," a Second Circuit case, by the way (32 N.Y.2d, at p. 198).

Weinrott also stated that "subsequent experience" and "contemporary attitudes" have brought about an enlarged conception of the arbitrator's function, and it expressly aligned New York policy with Federal policy, particularly under arbitration clauses as broad as the one involved here (*Prima Paint Corporation* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801; *Hamilton Life Ins. Co. of N. Y.* v. *Republic Nat. Life Ins. Co., supra; Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 2nd Cir., 271 F.2d 402, cert. dismissed, 364 U.S. 801, 81 S. Ct. 27, 5 L. Ed. 2d 37). While this enlargement and upward alignment was articulated in the light of a claim of fraud in the inducement of the contract—as opposed to a specific

claim of fraud inducing the arbitration clause itself—*Weinrott* did say, at p. 196 of 32 N.Y.2d, that:

> "A broad arbitration agreement reflects a general desire by the parties to have all issues decided speedily and finally by the arbitrators."

That includes, as the prior quote makes clear, the duty of "the arbitrators to decide what the agreement means and to enforce it according to the rules of law which they deem appropriate in the circumstances." This principle is also implicit in the holdings of the *Prima Paint Corp.*, and *Robert Lawrence* cases, *supra.* Thus, the holding below (p. 7 of the opinion; A96) to the effect that, even if the "interpretation" of the agreement raises issues of law, those legal issues are for the arbitrators, is a correct statement of both State—and Federal—law. To put it another way, except for the narrow issue (when properly raised) of fraud in the inducement of such a clause, a broad arbitration clause, certainly one as broad as the one here, relegates all issues, whether factual or legal or mixed, to the contractually selected forum, not to the courts, and judicial intervention is to be abjured. Such intervention is not only unwarranted but, also, it defeats the great purposes of arbitration, speed and finality.

Having made these statements, however, we are compelled to emphasize again that we in no way concede the existence of any extraordinary issues. What we have here —and what is being fought so strenuously—is what the Court below called (A94) a "renegotiation of a price for future services upon the happening of a commercial contingency previously contemplated," citing *American Home Assurance* v. *American Fidelity & Cas. Co.*, 2nd Cir., 356 F.2d 690, 693 and quoting thereupon as follows:

> "It is precisely such questions in specialized commercial dealings of this sort that are especially adapted to resolution by commercial men as arbitrators. Hav-

ing chosen in advance such a tribunal, appellant may not enlist the aid of the courts to delay or defeat its proper functioning."

Aeromexico, below, made much of its intent with respect to its right to control the "allocation of its corporate resources" (grandiose terminology having to do with meeting a price change expressly contemplated by the contract). Here, too, it talks in terms of "individual corporate judgment," "hard to imagine more important matters for individual corporate determination" (p. 11 of its brief), giving an "unknown third party a blank check, such as Triangle contends" (p. 15 of its brief—manifestly false in any event; see Exh. B annexed to the complaint, A27). Of course, everyone who opposes arbitration speaks in terms of no intent to arbitrate, no intent to cede valuable functions to arbitrators, no intent to give up prerogatives, etc., etc. All this cannot obfuscate what is involved in this controversy. The charge for servicing the DC-8s is set out in the contract. It is common knowledge a DC-8 carries some 200 passengers plus a certain amount of cargo. That takes so many workers and so much equipment to service. A DC-10 carries 250 to 350 people, depending on seat arrangements, and can carry more cargo than a DC-8. An arbitrator, familiar with the subject, should have no difficulty in deciding whether the quoted price is fair and reasonable, or unfair and unreasonable, and, in which latter event, what would be fair and reasonable, all in the light of what the parties proffer in evidence.

As was true below, Aeromexico continues to cite cases which are completely inapposite. We shall discuss, briefly, the most "significant" of these citations.

At p. 11 of its brief, Aeromexico states the arbitrator would be faced with the task of determining what would have satisfied both parties. This is an impossible statement, devoid of any substance whatever. The arbitrator

will resolve the controversy, period. He will do so according to the best of his conscience, and knowledge, guided by what is presented. Now, Aeromexico cites, in support of this extraordinary proposition, *Necchi* v. *Necchi Sewing Machines Sales Corp.*, 2nd Cir., 348 F.2d 693, cert. den. 383 U.S. 909, 86 S. Ct. 892, 15 L. Ed. 2d 664. Below, the case was cited for the "classic" proposition that arbitrability is for the courts—a position, the classicism of which, we pointed out, is somewhat diminished in the light of "subsequent experience" and "contemporary attitudes." Here, the citation is utilized to sustain a wholly contrived issue. Be that as it may, we pointed out below—and repeat here—that the contractual clause in issue in *Necchi* (and which Aeromexico claims is analogous here) reads as follows (p. 698 of 348 F.2d):

> "3(i) Six (6) months before the expiration of this agreement, that is, before June 30, 1962, Necchisew and Necchi S. p. A. of Pavia, shall examine the possibility of executing a new and, it is hoped, long term distributorship agreement for the same territory and at such terms and conditions as will be then discussed and defined. In the event such an agreement is not reached, the present agreement will be terminated on December 31, 1962, without need of any advance notice and without any right accruing to either party to make any claim whatsoever for damages or otherwise, by reason of such termination."

It is clear, then, that only a "possibility" was to be "examined," a "long term agreement" (otherwise undefined) is "hoped for," the "term and conditions thereof are to be discused and defined" then, and, if no agreement is reached, the basic agreement ends without any resulting claim, "for damages or otherwise." This Court held (at p. 698 of 348 F.2d) that, with such guidelines, not only would the terms and conditions of any new contract be too conjectural, but

also, the contract expressly imposed no obligation with respect to reaching any agreement. Thus, even if the duty to meet were breached, no damages could be assessed in so speculative, conjectural, and indefinite a situation. It escapes us how a dispute over the arbitrability over the failure to reach a totally new agreement, in the light of the language employed in the *Necchi* case, can be equated, even remotely, with the dispute in the instant case, a dispute perfectly capable of being disposed of by " 'men familiar with the practical intricacies * * *' " (*Fed. Commerce and Nav. Co.* v. *Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 2nd Cir., at p. 390, quoting from 63 Harv. L. Rev. 681). There is no issue here involving the writing of a new, wholly conjectural contract based on new, wholly conjectural terms. The arbitrator here will not dream up a new agreement—he will apply the present agreement to a new situation, precisely and expressly contemplated by the parties. Indeed, one of his first tasks would be to see whether an increase has taken place at all, for, as we have repeatedly noted, only increases in charges must be negotiated (Art. 3-3, A9-A10; A44-A45). If there is no increase, there need not be any negotiations at all.

Aeromexico rejects the *American Home Assurance* case, 2nd Cir., 356 F.2d 690, relied on by the Court below, as inapposite (see pp. 12-14 of its brief). We are frank to concede, with all respect, we do not completely understand quite what Aeromexico has in mind. This Court stated, in that case, that the controversy being referred to arbitration had to do with the meaning and effect of an exchange providing for, under certain conditions, an "adequate amendment * * * on a basis to be mutually arranged." That is even less definite than the task of the arbitrator here and, yet, this Court had no trouble in making its disposition. As for the comment that the issue in *American Home* is "distinct" from the one here, "since the issue which Triangle seeks to arbitrate involves a subject to which the parties did not agree," what Aeromexico is really saying

is that the result it desires this Court to reach, in and of itself, constitutes the distinction between this case and the *American Home Assurance* case. Equally incredible is the next sentence. Aeromexico says, unlike the situation here, the party resisting arbitration in *American Home* received the "benefit of the bargain" it made. This, then, is supposed to be another "distinction." But, Aeromexico did not receive any DC-10 services "benefit" because it breached the contract, terminated it, refused to let Triangle do its work, and hired someone else to do the work. This is, indeed, a "little hard to digest," to borrow Judge Smith's felicitous phrase (*Hamilton Life Ins. Co.* v. *Republic,* 408 F.2d, at p. 610), hard, indeed, where the one who breaches, the one who terminates, complains it received nothing after the termination and, therefore, presumably, considers itself absolved by its own breach, from the duty to arbitrate the controversy leading to the breach. Nor do we comprehend, in any event, how the receipt or non-receipt of "benefits" distinguishes this case from the *American Home* case with respect to the issue of arbitrability of unresolved controversies.

The citation of *Wynkoop* v. *Western Union,* 268 N.Y. 108 (p. 10 of Aeromexico's brief) completely misses the point. There, some price elements were held not includible in a recalculation because the parties agreed that one of them had to be satisfied with those elements before they could be included. Here, we are not concerned with that. We are concerned, rather, with whether the parties agreed to arbitrate price increases, and whether Aeromexico's dissatisfaction with the price asked by Triangle ends the matter or constitutes, as we say it does, the starter which turns on the arbitration engine. It is not Aeromexico's dissatisfaction that is here being challenged—it is what happens after that dissatisfaction has been expressed.

In *A/S Custodia* v. *Lessin,* 503 F.2d 318 (adv.) (p. 17 of Aeromexico's brief) this Court held only that a factual

dispute over whether an agreement containing an arbitration provision was made in the first place, ought not be resolved on affidavits. Here, there is no such dispute; the contract was made. The "dispute" here is over coverage by an arbitration clause contained in an agreement expressly noting the very contingency the resisting party claims is not covered.

Interocean Shipping v. *National Shipping,* 462 F.2d 673, another 2nd Cir. case we ourselves cited below, is also cited at p. 17 of Aeromexico's brief. There, too, not only was there a specific denial that an agreement (there a charter-party) was made, but also, evidence was furnished to demonstrate a basis for such denial—not self-serving statements of subjective intent, but hard evidence disputing the making of the agreement in chief. The District Court there ordered arbitration on the affidavits. This Circuit reversed, ordering a full trial. That case hardly constitutes authority for Aeromexico's proposition that all it has to do is say that no arbitration was intended and thereby, an issue automatically arises as to whether a contract to arbitrate was made in the first place (a position rendered even more extraordinary where, we continue to insist, the express wording of the contract proves precisely the contrary).

There is a further point to make, relative to what we have referred to as Aeromexico's declaration of termination of the contract. New York law has it that termination of a contract, even a proper termination—which is certainly not what we have here—does not affect the arbitrability of controversies arising thereunder or in connection therewith, where a clause in the terminated contract refers such controversies to arbitration (*H. M. Hamilton & Co., Inc.* v. *American Home Assurance Co.,* 15 N.Y.2d 595, aff'g 21 A.D.2d 500; see, particularly, on this point, page 503 of 21 A.D.2d; *Matter of Potoker,* 2 N.Y.2d 553; see, particularly, the Court's comments at pages 559-560, as to its being

the arbitrator's function to determine who breached, who did not breach, who performed, who did not, etc., where a broad clause such as the one here is involved). See, also, *Necchi* v. *Necchi Sewing Machine Sales Corp., supra,* footnote 1 at p. 695 of 348 F.2d. In the instant case, of course, the arbitration clause expressly covers, *inter alia,* all controversies arising out of, or in connection with, the breach of the agreement (A17; A34; A52).

There remains little to add to this point but to reemphasize that, under New York law, given the initial determination the claim is contractually covered, all subsequent interpretations under a broad arbitration clause are for the arbitrator (save in exceptional circumstances not here present) (*Matter of Glekel,* 30 N.Y.2d 93, 97; *Matter of Dimson,* 19 N.Y.2d 316, 324; *Board of Education* v. *Chautauqua Central School Teachers,* 41 A.D.2d 47, 50; and, of course, *Matter of Exercycle, supra,* 9 N.Y.2d 329, 334).

We close this segment of the brief by noting, here too, as a matter of Hornbook law, without the need for elaboration, that New York and Federal law and policy favor arbitrability. Accordingly, even on the unwarranted assumption that doubt arises as to arbitrability in this case, that doubt must be resolved in favor of arbitrability (*Coenen* v. *R. W. Pressprich & Co.,* 2nd Cir., 453 F.2d 1209, 1212, cert. den. 406 U.S. 949, 32 L. Ed. 2d 337, 92 S. Ct. 2045; *Metro Industrial Painting Corp.* v. *Terminal Constr. Co.,* 2nd Cir., 287 F.2d 382, 385, citing *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.,* 2nd Cir., 271 F.2d 402, 410, cert. dis. 81 S. Ct. 27, 364 U.S. 801, 5 L. Ed. 2d 37, and citing *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U.S. 449, 453, 55 S. Ct. 313, 79 L. Ed. 583; *Signal-Stat Corp.* v. *Local 475,* 2nd Cir., 235 F.2d 298, cert. den. 77 S. Ct. 1293, 354 U.S. 911, 1 L. Ed. 2d 1428, reh. den. 78 S. Ct. 7, 355 U.S. 852, 2 L. Ed. 2d 61; *Crawford* v. *Merrill Lynch,* 35 N.Y.2d 291, 299 (adv.); *Matter of Weinrott,* 32 N.Y.2d 190, 199).

At p. 199 of 32 N.Y.2d, the New York Court of Appeals said:

> "Certainly the avoidance of court litigation to save the time and resources of both the courts and the parties involved make this a worthwhile goal. One way to encourage the use of the arbitration forum would be to prevent parties to such agreements from using the courts as a vehicle to protract litigation."

The arguments proffered by Aeromexico, and the purported distinctions allegedly rendering inapposite the authorities relied on by the Court below are spurious and devoid of merit. No valid challenge to the arbitrability of the subject controversy has been raised. The complaint fails.

POINT II

The complaint seeking a declaratory judgment must demonstrate that a substantial controversy exists. Having failed on its face to so demonstrate, it must be dismissed.

One does not set out a substantial controversy merely by alleging, in a complaint for a declaratory judgment, differences in interpretation, as is the case here. The showing of such a controversy must be actual, not spurious or contrived. And, without a showing of a substantial controversy, declaratory judgment procedures are not available (*Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826; see, also, *Golden* v. *Zwickler*, 394 U.S. 103, 108, 22 L. Ed. 2d 113, 89 S. Ct. 956; *Muller* v. *Olin-Mathieson Chemical Corporation*, 2nd Cir., 404 F.2d 501, 504; *Hanes Dye and Finishing Company* v. *Caisson Corp.*, 309 F. Supp. 237, 240, holding the "dichotomy of contention" must be genuine.

In *Muller* v. *Olin-Mathieson,* this Circuit stated, at p. 504 of 404 F.2d:

> "The difference between * * * substantial controversies * * * and * * * ones which are not * * * is one of degree, to be determined on a case by case basis."

New York law, under which the contract is to be governed and construed, has it that:

> "A dispute is not arbitrable if it is grounded on an asserted interpretation of the agreement contrary to unambiguous provisions thereof. (Matter of General Electric Co. [United Elec. Radio & Mach. Workers], 300 N.Y. 262)" (*Matter of New York Mirror,* 5 A.D. 2d 423, 427).

The reverse is also true. An assertion as to the non-arbitrability of a dispute will not be sustained if that assertion is contrary to the unambiguous provisions of the governing agreement. Just as *Matter of Exercycle* states that arbitration will be enjoined in the absence of a "bonafide" dispute (p. 334 of 9 N.Y.2d), "where the asserted claim is frivolous," arbitration will not be enjoined where the claim of non-arbitrability is frivolous.

It follows, we submit, that, in the face of the unambiguous contract here (or where, on the assumption, *arguendo,* some doubt can exist, accepted principles require a resolution of that doubt in favor of arbitrability) the controversy between the parties here over arbitrability is not substantial within the meaning of the Declaratory Judgment Act (Title 28, U.S.C., Secs. 2201, 2202). The controversy alleged in the complaint arises only because Aeromexico presents the naked claim that the differences between the parties hereto are not arbitrable in the face of a contract clearly mandating that those differences be arbitrated in the absence of their resolution. That is not the

equivalent of substantiality—neither under New York nor under Federal law—and so, the complaint seeking a declaratory judgment fails.

POINT III

The portion of the judgment below denying plaintiff-appellant's motion for a stay is not appealable.

It is not our purpose or desire to obfuscate the principal point to be resolved on this appeal, and so, we will not dwell, to any large extent, on the somewhat anachronistic retention of law versus equity considerations involved in assessing whether a grant or denial of an interlocutory stay is deemed to be appealable under Title 28, U.S.C., Sec. 1292(a)(1). (That the ruling below, in this regard, is not final within the meaning of Title 28, U.S.C., Sec. 1291 seems plain enough, *Wallace* v. *Norman Industries, Inc.*, 5th Cir., 467 F.2d 824, 826).

In *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 2nd Cir., 391 F.2d 821, this Court reiterated, at p. 824, a prior holding (in turn adopting the Fifth Circuit view) that:

> "An order staying or refusing to stay proceedings in the District Court is appealable under Sec. 1292 (a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; *and* (B) the stay was sought to permit the prior determination of some *equitable* defense or counterclaim."

It follows, we think, that if the action in which the order is made is essentially an equitable action, the first portion of the rule is not met and so, non-appealability results. In that very case, this Circuit stated, at p. 824 of 391 F.2d:

> "* * * a suit to enjoin pending arbitration proceedings, coupled with a claim for declaratory relief, has a pronounced equitable cast" (citing cases).

Because the quoted comments were made in relation to but one segment of the case before it, which segment was, in turn, but an adjunct to an overriding dispute involving still another party, the circumstances of which overriding dispute were attuned to the rules above set out, appealability was accorded the ruling of the District Court there staying the two declaratory judgment suits pending arbitration. But, this Court plainly indicated that its ruling would have been otherwise had the segment referred to been before it by itself (see *Schine* v. *Schine,* 2nd Cir., 367 F.2d 685, 687).

Actually, even if the declaratory judgment suit does not clearly sound in equity, but constitutes some sort of "homogenization" of legal, equitable, and statutory elements in which neither legal nor equitable elements predominate, the complaint is deemed equitable for the purposes of testing appealability of interlocutory stays or denials therein (*Danford* v. *Schwabacher,* 9th Cir., 488 F.2d 454, 457; cf. concurring opinion by Judge Friendly in *Schine* v. *Schine, supra,* at p. 688 of 367 F.2d).

The facts in this case are not precisely on a par with those set out in the *American Safety Equipment* case. There, Maguire sought and obtained a stay, in the District Court, of a declaratory judgment case against it, pending its desired arbitration. Here, Aeromexico made the application for a stay of arbitration which was denied (although a stay of arbitration was granted pending disposition of this appeal) while Triangle moved only to dismiss. Triangle did not answer the complaint herein and has not literally proffered a defense—it considered the complaint insufficient and moved accordingly.

Analogizing from the foregoing, then, the declaratory judgment suit here is not only essentially equitable in character but also, a stay in this case was not sought to permit the prior determination of some equitable defense or counterclaim (not to mention that the "equitable defense or counterclaim here" must first be assumed to be found herein by equating that with the involvement of, and role played by, the agreement containing the arbitration clause). The stay here was sought for precisely the opposite purpose—not to permit such a prior determination. Add to this the fact that the underpinning for the stay—the complaint itself—was dismissed and, we submit, it follows that denial of the motion for a stay of arbitration in this case is not appealable, notwithstanding the denial is included within the final judgment below (*Baltimore Contractors* v. *Bodinger,* 348 U.S. 176, 99 L. Ed. 233, 75 S. Ct. 249).

CONCLUSION

The judgment of the Court below should be affirmed in its entirety, with costs and disbursements to Triangle.

New York, New York
January 29, 1975

Respectfully submitted,

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ADDENDUM

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Title 28, U.S.C.

§1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Title 28, U.S.C.

§1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

* * * * *

Declaratory Judgment Act—Title 28, U.S.C.

§2201. Creation of Remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Federal Arbitration Act, Title 9

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged

to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.